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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 886

CARL W. EVANS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GILBERT S. ROSENTHAL
Attorney for Petitioner
401 Broadway
New York, New York 10013

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IN THE

Supreme Court of the United States

October Term, 1970

No.

CARL W. BRAUN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the below-stated judgment and order of United States Court of Appeals for the Second Circuit.

A. The Opinion Below

There was no opinion below. A copy of the Court's order of October 1st, 1970 is annexed hereto as Appendix A. This order refers to the motion made in respect to the Court's order of September 24, 1970. That order is annexed hereto as Appendix B, and the motion and affidavit are annexed hereto as Appendix C.

B. Jurisdiction

The Judgment and Order of the Circuit Court of Appeals was entered October 1st, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

C. Questions Presented

The questions specifically raised by the petitioner are:

I. Did the Court of Appeals for the Second Circuit abuse its discretion in denying the petitioner due process of law by denying his motion to vacate the order dismissing his appeal?

II. Did the Court of Appeals for the Second Circuit abuse its discretion in denying petitioner due process of law by dismissing his appeal summarily without opportunity to be heard upon the merits?

D. Constitutional Provisions and Statutes Involved

Fifth Amendment of the United States Constitution, the pertinent portion of which reads:

> "Due Process of Law * * * nor be deprived of life, liberty or property, without due process of law; * * * "

Rule 11(d), Federal Rule of Appellate Procedure:

> "(d) Extension of Time for Transmission of the Record; Reduction of Time. The district court for cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court

shall not extend the time to a day more than 30 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor."

E. Summary Statement of Matters Involved

On June 29, 1970 Judgment of Conviction was entered against the petitioner by the Hon. Marvin E. Frankel, D.J. in the Southern District of New York, after a finding of guilt by a trial jury under an Information charging the petitioner with violation of § 1709 of Title 18 USC (embezzlement from the mail). The petitioner was sentenced as a young adult offender and placed on probation for a period of two years, with imposition of sentence suspended.

On July 7, 1970 petitioner's present counsel served and filed a notice of appeal. At or about the same time petitioner's trial counsel served and filed a notice of appeal, erroneously designating the indictment number 69 Cr 682 instead of the superseding Information, which was No. 70 Cr 225.

Thereafter petitioner's trial attorney moved in the United States Court of Appeals for the Second Circuit to be relieved as attorney for petitioner and petitioner's pres-

ent attorney submitted an affidavit consenting thereto. This affidavit is annexed hereto as Appendix D.

The motion was granted and a time schedule was provided in the order of Wilfred Feinberg, U.S. C.J., dated July 24, 1970 which appears herein as Appendix E.

A copy of this order was never served upon petitioner's attorney, as more fully appears in the notice of motion and affidavits set forth herein as Appendix C.

Acting upon the Order of Judge Feinberg, the Clerk of the Court of Appeals on August 18, 1970 entered an order herein dismissing the appeal of the petitioner. This order is annexed hereto as Appendix F.

Not being aware of either the Order of Judge Feinberg or the Order of the Clerk of the Court, petitioner's attorney and the United States Attorney for the Southern District entered into a stipulation extending the time within which petitioner might docket his record on appeal up to and including September 1, 1970. This stipulation was marked "So Ordered" by the Hon. J. Edward Lumbard, Chief Judge of the United States Court of Appeals for the Second Circuit. In the stipulation it was set forth that petitioner's attorney had not received the sentencing minutes until August 25, 1970. The aforementioned stipulation and order are annexed hereto as Appendix G.

Thereafter petitioner's attorney received in the mail on Monday, September 28th, a copy of an order made Thursday, September 24, and entered Friday, September 25, 1970 wherein and whereby Chief Judge Lumbard vacated his order entered upon the stipulation referred to *supra* (Appendix G) and reinstated the order of August 18, 1970

dismissing the appeal of the petitioner. A copy of this order of Judge Lumbard is hereto annexed and appears herein as Appendex A.

Immediately upon receipt of the order set forth in Appendix A, petitioner's attorney prepared and served a notice of motion to vacate the order of September 24 and to reinstate the order of September 2, 1970 and to grant the petitioner an opportunity to file his record on appeal and to proceed with the appeal on the merits. The notice of motion and affidavits submitted in conjunction therewith are referred to *supra* and are annexed hereto as Appendix C.

As related *supra*, this motion was denied by Chief Judge Lumbard under order dated October 1, 1970, which order is annexed hereto as Appendix A.

F. Reasons for Granting Writ.

1. The Court of Appeals for the Second Circuit abused its discretion in denying the petitioner due process of law by dismissing his appeal.

The Court of Appeals for the Second Circuit abused its discretion and denied the petitioner due process of law in refusing to vacate the order dismissing his appeal. For the Court of Appeals to have summarily dismissed petitioner's appeal after so brief a period of time, was an abuse of discretion. As appears in the supplemental affidavit of petitioner's attorney submitted in connection with petitioner's motion to vacate the order of dismissal, petitioner's attorney was not aware of the fact of the entry of the order of July 24, 1970 which provided that the appeal be dismissed if the record were not docketed on or before

August 17, 1970. Apparently what had occurred was that the Clerk of the Court of Appeals failed to mail a copy of this order to your petitioner's attorney. The reason for this would appear to be due to the fact that the Clerk's office of the United States Court of Appeals for the Second Circuit was carrying the appeal of the petitioner herein under two "Miscellaneous Record" numbers, namely, MR 4055 and MR 4071. It further appears from the body of the order that this was due to the fact that the erroneous notice of appeal from Indictment, 69 Cr 882, had been filed by petitioner's trial attorney and petitioner's present attorney had correctly filed a notice of appeal from the superseding Information, number 70 Cr 225.

The tight time table established by the order of July 24 would never have occurred except for the motion of petitioner's former attorney to be relieved as attorney to prosecute the appeal. This becomes obvious when one considers the provisions of Rule 11(d) of the Federal Rules of Appellate Procedure wherein it is provided that the District Court might extend the time within which the transcript of the record should be filed up to ninety days from the date of the filing of the notice of appeal. The Court of Appeals was alerted to the fact that petitioner's attorney had not as yet received the minutes of the sentence, which had been ordered, and which were an important part of the petitioner's appeal in that it established the fact that both at the time of his arrest, trial and sentence, petitioner was suffering from mental disabilities sustained as a result of his service in the Armed Forces in Viet Nam.

While it might be urged that petitioner's attorney was neglectful in not checking daily to ascertain the decision of the Court of Appeals on the motion of the former attorney to be relieved, it is respectfully submitted and urged that petitioner's attorney had the right to rely upon prior experience and custom, namely, that the Clerk of the Court would mail to him a copy of any order entered upon the motion being decided. That petitioner's present attorney acted promptly upon realizing the entry of the order of July 24, 1970 and the subsequent order dismissing the appeal entered by the Clerk on August 18, 1970, of which neither he nor the United States Attorney were advised, as is obvious by the entry into the stipulation dated August 28, 1970 (Appendix G).

II. The Court of Appeals for the Second Circuit abused its discretion and denied petitioner due process of law by dismissing his appeal summarily without an opportunity to be heard upon the merits.

The establishment of a tight time schedule by the United States Court of Appeals for the Second Circuit is undoubtedly justified by the vast volume of work presented to the Court. However, discretion and selectivity should be exercised by the said Court in enumerating the appeals that should be held to a tight time schedule. Unquestionably the summary dismissal of appeals will lighten the calendar and work load of the Second Circuit. In ancient times despots solved the population explosion and concurrent starvation of their subjects by beheading them.

In the instant case, we are faced with an appeal by a young man, a member of a minority group, who had been physically and mentally wounded and injured in the service of his country in Vietnam. He was not attempting to re-

main at liberty and avoid the unpleasantness of incarceration by "stalling" and prolonging the time within which his appeal would be heard. We are not faced with an individual who might be classified as a member of "organized crime", or one who might be likely to continue a life of crime during the pendency of the appeal. Whereas the Court might not have been aware of these facts when the order of July 24 was entered, the Court was made aware of these facts in the motion to vacate its order of September 24, 1970, they being set forth in the moving and supplemental affidavits (Appendix C).

For this and other Courts (both Federal and State) to say that it is a denial of due process to permit an assigned attorney to be relieved from proceeding with an appeal which he fails to find meritorious,[1] become a travesty of justice where a worse effect is created by the refusal of extension of time within which to file a record on appeal and a summary dismissal of the appeal.

In the "no merit" cases the defendant does have, at the very least, an examination of the record by the Appellate Court, whereas in an instance of this type no consideration whatsoever is given to the possible merits of petitioner's appeal.

In addition to depriving petitioner of his right to appeal the Court of Appeals, by its action, creates a condition in and whereby an attorney may properly be reluctant to undertake an appeal in the Federal jurisdiction. Peti-

[1] Anders v. California (1967) 386 U.S. 738, 18 L ed 2d 493, 87 S.Ct. 1396; Entsminger v. Iowa (1967) 386 U.S. 748, 18 L ed 2d 501, 87 S.Ct. 1402; United States v. Mallison (1957 2d Cir.) 250 F.2d 792; People v. Lewis (1968 N.Y. App. Div. 4th Dept.) 30 A.D.2d 932, 293 N.Y.S.2d 779; People v. Borum (1960 N.Y. Ct. of Appeals) 8 N.Y.2d 177, 203 N.Y.S.2d 84.

tioner's attorney, a member of the Bar, in good standing for over forty-two years, was absent from the City and his office most of the period designated to the filing of the record on appeal, part of the period of his absence being devoted to the affairs of Bar Associations (Appendix C), finds himself in the unenviable position of attempting to explain to a mentally incapacitated lay person why his appeal would not be considered upon the merits and also finds himself in the further position of possibly being subjected to criticism for neglect of petitioner's interests.

In addition to the foregoing, we find the petitioner prejudiced because of the fact that his mother in a commendable effort to assist petitioner in carrying his own weight, had retained private counsel for petitioner instead of having him apply to the Court for leave to appeal in forma pauperis (Appendix D).

Counsel for the petitioner respectfully submits that all of the foregoing establishes not only an abuse of discretion by the Court of Appeals but also a classic example of denial to petitioner of the due process guaranteed him by the Constitution.

It is respectfully submitted that one of the functions of this Honorable Court being the supervision over the fairness of the administration of justice in Federal Courts, this Court's stewardship and supervision of the United States Courts' administration of justice requires the granting of this writ.

Respectfully submitted,

GILBERT S. ROSENTHAL
Attorney for Petitioner

APPENDIX A

Order of United States Court of Appeals, Dated October 1, 1970

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARL W. EVANS,

Defendant-Appellant.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 1st day of October, one thousand nine hundred and seventy.

ORDER

on motion of counsel for appellant to vacate the order of this Court, filed September 25, 1970, and to reinstate this Court's order of September 2, 1970 granting leave to file the record and docket the appeal.

It is hereby ordered that the motion is DENIED.

/s/ J. EDWARD LUMBARD
J. Edward Lumbard

APPENDIX B

Order of United States Court of Appeals, Dated September 24, 1970

[SAME TITLE]

The court, noting that the appeal from the United States District Court for the Southern District of New York was dismissed on August 18, 1970 for failure to file the record, and further noting that an order was filed on September 2, 1970 granting leave to extend the time to file the record and docket the appeal to September 1, 1970, and that this order was entered upon stipulation of the parties that failed to draw the court's attention to the prior dismissal,

IT IS HEREBY ORDERED that this court's order filed September 2, 1970, granting an extension of time to file the record and docket the appeal is vacated,

IT IS FURTHER ORDERED that the dismissal of the appeal on August 18, 1970 shall remain effective.

J. EDWARD LUMBARD
Chief Judge

Dated: September 24, 1970
/s/JEL

APPENDIX C

Notice of Motion

UNITED STATES COURT OF APPEALS
For the Second Circuit

[Same Title]

Sir:

Please take notice, that upon the annexed affidavit of Gilbert S. Rosenthal, attorney for appellant herein, duly sworn to the 28th day of September, 1970, the undersigned will move this Court before a judge of the United States Court of Appeals for the Second Circuit at the United States Courthouse, Foley Square, New York, New York for an Order vacating the Order made herein on September 24, 1970, and entered September 25, 1970, and re-instating this Court's order of September 2, 1970, which order granted an extension of time to file the record and docket the appeal herein, and for such other and further relief as to the Court may seem just and proper in the circumstances.

Dated: New York, New York
September 28, 1970

Yours, etc.,

Gilbert S. Rosenthal
Attorney for Appellant Evans

To:

Hon. Whitney North Seymour, Jr.
U.S. Attorney for the Southern District of
New York

Affidavits of Gilbert S. Rosenthal in Support of said Motion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

1. GILBERT S. ROSENTHAL, being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice before this Court and am the attorney for the defendant-appellant Carl W. Evans, in the instant appeal. I make this affidavit in support of the present motion to vacate the order of this Court made September 24, 1970, herein and filed herein on September 25, 1970, and to re-instate the prior order of this Court made on September 2, 1970, which prior order granted defendant-appellant an extension of time until September 1, 1970, on Stipulation, to file the record and docket the appeal herein.

2. Deponent did not represent the defendant-appellant in the court below. Final judgment was entered in the Court below on June 29, 1970, by the Honorable Marvin E. Frankel, District Judge, after jury trial. The defendant-appellant was convicted of violation of Title 18, Section 1709, U.S.C. and was sentenced by Judge Frankel as a Young Adult Offender pursuant to Sec. 5010(a) of Title 18 U.S.C. as extended by Sec. 4209 of Title 18 U.S.C., being placed on

probation for a period of two (2) years subject to the standing probation order of the Court, with his sentence on the two counts of the indictment being suspended.

3. Deponent was retained herein by the defendant-appellant's mother, Mrs. Katherine Evans on or about July 7, 1970, and immediately prepared and caused to be served and filed a Notice of Appeal herein. Deponent then timely and promptly ordered the minutes of the trial from the Southern District Court Reporters. No one in deponent's office other than your deponent was aware of the facts of the case, even in a general way.

4. On August 7, 1970, your deponent left the City and State of New York to attend the conventions of the National Association of Defense Lawyers in Criminal Cases and the American Bar Association, and thereafter for a short rest and vacation. At that time, your deponent instructed his office associate, William C. Herman, Esq., that deponent was expecting to shortly receive the minutes of sentence in this case and that immediately upon receipt of same the case was to be docketed in this Court and the Record on Appeal filed. Mr. Herman did not take any affirmative steps toward docketing and filing during the appropriate period for two reasons: first, the minutes of sentence were not delivered to deponent's office until August 25, 1970, although I had expected them long before August 18, 1970; and secondly, Mr. Herman was inadvertently misled and misinformed about last date for performing these functions in this case. The facts as to how Mr. Herman became inadvertently misled as to the operative dates in this case are

set forth hereinafter as related to deponent by Mr. Herman.

5. When deponent left New York on August 7, 1970, he did not directly state to Mr. Herman that the forty days provided by Rule to docket and file in this case would expire on August 18, 1970. Deponent simply told Mr. Herman that the sentence minutes were expected momentarily and that when they came in the case was to be docketed immediately. During the operative period, our office did receive minutes from the Southern District Court Reporters, but did receive minutes of proceedings held May 12, 1970, the date originally set for sentence. On receipt of said papers, Mr. Herman immediately notified the Court Reporters that they had forwarded the wrong minutes and requested that they furnish the proper sentence minutes on an emergency basis. This they did, but the minutes were not received at this office until August 25, 1970. When Mr. Herman received said wrong minutes, he was under the impression that the record on appeal herein need not be docketed and filed until on or about September 10, 1970, since there was in the office file in this case a letter Notice from the Clerk's office of the District Court to the effect that a Notice of Appeal had been filed in 69 Cr. 350 on July 28, 1970. Mr. Herman did not realize that said Notice did not relate to this case, but related to the case of *U. S. v. Casiano*, another appeal being handled by deponent. This office never received any Notice from either the District Court or this Court as to when the Record on Appeal herein had to be filed and the appeal docketed. This lack of communication may be attributed to the fact that deponent was not trial counsel below, and said notice may have been sent to the trial attorney.

6. Your deponent did not finally return to New York from this vacation until early September, 1970, but deponent did return to New York on August 24, 1970, after the Bar Association conventions, just for one day. On that day deponent ascertained all of the facts set forth above and caused to have drawn and signed the stipulation herein dated August 28, 1970, which formed the basis for the order of September 2, 1970, which this Court has now vacated. When this Stipulation was drawn, and when said Order was entered, deponent was totally unaware that any order had ever been entered herein dismissing the appeal. Had deponent been so aware, then the fact would have been revealed in the Stipulation. Deponent's office had no knowledge of such Order until receiving this Court's Order of September 24th, to which this motion is directed. The District Court docket entries in this case, which contain two entries as late as August 27, 1970, show no indication of the entry of any order of August 18th, in the Court of Appeals.

7. The record on appeal herein was actually docketed by September 1, 1970. The defendant-appellant is on probation pursuant to his sentence as a Young Adult Offender. Your deponent believes that the appeal herein is a meritorious one and is based upon substantial questions of law. It should be apparent to the Court that this defendant's family, which is very poor, would not prosecute an appeal from a judgment unless they and counsel were convinced that there were merit to the appeal. This is especially cogent in view of the fact that defendant is on probation. One of the issues to be raised on the appeal deals with the question whether the defendant, a wounded war veteran

treated at various veterans administration hospitals for nervous disorders incurred in the service of our country, was actually competent to stand trial herein. The existence and seriousness of this issue are borne out by the minutes of sentence of June 29, 1970, for which deponent's office was waiting when the time to docket the Record on Appeal herein elapsed.

WHEREFORE, your deponent respectfully prays that an Order be made and entered herein vacating the Order filed herein on September 25, 1970, and re-instating the Order of September 2, 1970, which Order granted to defendant-appellant an extension of time to file the Record and Docket the appeal in the instant case.

(Sworn to by Gilbert S. Rosenthal on the 28th day of September, 1970.)

Supplemental Affidavit

UNITED STATES COURT OF APPEALS
For the Second Circuit

[Same Title]

State of New York
County of New York } ss.:

Gilbert S. Rosenthal, being duly sworn, deposes and says:

That he is the attorney for the above named defendant-appellant.

That since serving his notice of motion and affidavit requesting that the order of dismissal of the appeal herein be vacated, which notice of motion and affidavit was prepared the same day that the copy of the order September 24th was received by your deponent, your deponent has had an opportunity to speak with the United States Attorney and to check the records of this Honorable Court and your deponent discovered that there was an order entered of July 24, 1970 directing that the appeal be dismissed if the record were not docketed on or before August 17, 1970.

Your deponent was never aware of the entry of the said order and that although the docket of the Clerk's office of this Court carries your deponent's name and address as the attorney for the appellant, your deponent has never received a copy of such order and does not find one within his files. In addition, your deponent never received a copy of the order of this Court of August 18, 1970 dismissing the within appeal.

Supplemental Affidavit

Your deponent respectfully submits that this is not a case or matter where an attorney is "stalling" so as to extend the period of liberty pending appeal of an appellant. As pointed out in your deponent's original affidavit, the defendant appellant is a physically and mentally wounded veteran of the Viet Nam Action and was placed upon probation, after his conviction, and is still presently on probation.

Your deponent has been in the active practice of law for over forty-two years and does not recall any other instance where he failed to file a record on appeal in due time in this Court, or any other Appellate Court (State or Federal), and he respectfully submits that he would not be in the present situation if he or his office associates had been aware of the order of July 24, 1970.

WHEREFORE, your deponent continues to pray for the relief requested in the notice of motion and affidavit annexed thereto and respectfully asks that the within supplemental affidavit be considered in conjunction with the papers previously submitted.

(Sworn to by Gilbert S. Rosenthal on September 30, 1970.)

APPENDIX D

Affidavit of Gilbert S. Rosenthal

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GILBERT S. ROSENTHAL, being duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice in the State of New York and in the within Court.

That your deponent has been retained by Mrs. Katherine Evans of 177-48 106th Avenue, Jamaica, New York, the mother of the defendant herein to prosecute an Appeal in behalf of the defendant herein and caused a Notice of Appeal to be served and filed on or about July 7th, 1970, your deponent having ascertained that a Notice of Appeal had been served by Hyman Greenberg, Esq., but a search of the records failed to disclose that the said Notice of Appeal had, in fact, been filed.

That your deponent has been informed by the defendant and his mother, Katherine Evans that they have no objection to Mr. Greenberg being relieved as attorney for the defendant and that they desired your deponent to continue as his attorney in connection with the Appeal herein.

APPENDIX D—Affidavit of Gilbert S. Rosenthal

It is possible that your deponent was unable to find any record of the Notice of Appeal having been filed by Mr. Greenberg since it appears upon his Motion papers that he is using the Indictment No. 69 Cr. 882, whereas the defendant was tried, found guilty and sentenced under a superseding Indictment bearing No. 70 Cr. 225.

The defendant is presently receiving treatment in the Veteran's Hospital at Ft. Hamilton, Brooklyn, New York and is without funds. However his mother hopes to be able to pay a nominal fee to your deponent. If she finds that she is unable to do so she most respectfully reserves the right to make application to this Honorable Court for the assignment of counsel. She has already paid for the Minutes of the Trial and your deponent is presently awaiting the Minutes of the Sentence which have been ordered.

(Sworn to by Gilbert S. Rosenthal on July 20, 1970).

APPENDIX E

Order of United States Court of Appeals, Dated July 24, 1970

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of July, one thousand nine hundred and Seventy.

[SAME TITLE]

It is hereby ordered that the motion made herein by Hyman J. Greenberg, Esq. counsel for appellant Carl W. Evans by notice of motion dated July 10, 1970 to be relieved of counsel, on appeal be and it hereby is granted.

It is further ordered that upon his affidavit dated July 20, 1970, Gilbert S. Rosenthal, Esq. is substituted as counsel for appellant Evans.

It appearing that the Notice of Appeal in 69 Cr. 882 (MR 4055) was inadvertantly filed, that indictment having been superseded by Information #70 Cr. 225, and it further appearing that a timely Notice of Appeal has been filed in 70 Cr. 225 (MR 4071), MR 4055 is deemed dismissed without prejudice to the prosecution of the appeal in MR 4071.

Further ordered that appellant shall docket the record on appeal on or before August 17, 1970.

APPENDIX E—Order of United States Court of Appeals, Dated July 24, 1970

Further ordered that appellant shall file his brief and appendix on or before September 28, 1970.

Further ordered that the Government shall file its brief on or before October 28, 1970.

Argument of the appeal be and it is hereby set for the week of November 9, 1970.

Further ordered that if the time schedule set forth above is not met by appellant the clerk is directed forthwith to dismiss the appeal.

/s/ WILFRED FEINBERG
Wilfred Feinberg
U. S. C. J.

APPENDIX F

Order of United States Court of Appeals, Dated August 18, 1970

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of August, one thousand nine hundred and seventy.

Present:

HON. WILFRED FEINBERG,

Circuit Judge.

70 Cr. 225

[SAME TITLE]

An order having been entered herein on July 24, 1970 directing that the record shall be filed on or before August 17, 1970, and that the appellant's brief and appendix shall be filed on or before September 28, 1970 and that if the time schedule as set forth is not met by the appellant, the Clerk shall forthwith dismiss the appeal.

And said record not having been so filed,

Upon consideration thereof, it is

Ordered that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

APPENDIX G

Stipulation and Order of United States Court of Appeals, Dated September 1, 1970

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED by and between Gilbert S. Rosenthal, attorney for the defendant-appellant Carl W. Evans, and the United States Attorney for the Southern District of New York, that the time for the defendant-appellant to docket his record on appeal herein be and the same hereby is extended to and including September 1, 1970 by reason of the fact that the attorney for the defendant-appellant herein did not receive the minutes of the sentence in this case from the Southern District Court Reporters until August 25, 1970, although said minutes had been promptly ordered by the attorney for the defendant-appellant.

APPENDIX G—Stipulation and Order of United States Court of Appeals, Dated September 1, 1970

Dated: New York, New York
August 28, 1970

/s/ GILBERT S. ROSENTHAL
Gilbert S. Rosenthal

UNITED STATES ATTORNEY SOUTHERN
DISTRICT OF NEW YORK
By JOHN W. NIELDS, JR.
John W. Nields, Jr.
Assistant United States Attorney

So ordered
J. EDWARD LUMBARD
USCJ
Sept. 1, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 886

CARL W. EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 29, 1970, petitioner was convicted in the Southern District of New York for embezzlement from the mails. He was sentenced as a young adult offender and placed on probation for two years. Notice of appeal was filed by present counsel on July 7, 1970.

On July 10, 1970, petitioner's trial counsel moved to be released and on July 20 petitioner's present counsel consented to be substituted (App. D, p. A-11).* By order dated July 24, 1970, Judge Feinberg signed an order substituting present counsel and dismissing an erroneous notice of appeal filed by trial counsel. The order provided that appellant should docket the

*App. — refers to appendices to the petition on file with the Court.

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record on or before August 17 and file his brief by September 28; if the time schedule was not met, the clerk was directed to dismiss the appeal forthwith (App. E., pp. A–13–14). On August 18, the record not having been docketed, the appeal was accordingly dismissed (App. F., p. A–15).

Without reference to the order of dismissal, petitioner's counsel and the United States Attorney stipulated on August 25, that the time to docket the record be extended to September 1, 1970, on the ground that the minutes of sentencing had not been received. Judge Lumbard entered "so ordered" on the stipulation (App. G, pp. A–16–17) but vacated his order on September 24, 1970, after learning that the appeal had already been dismissed (App. B., p. A–2).

Petitioner moved to vacate that order. In an affidavit, his counsel alleged that, when he left the city on August 7, he instructed his associate to file the record in the court of appeals as soon as the minutes of the sentencing were received; that he had expected to receive the minutes before August 18, but that because of an error they were not received until August 25; that the associate had erroneously assumed that he had until September 10 to file the record. He stated that when the stipulation as to the record was drawn he was unaware that any order had been entered dismissing the appeal. One of the issues he said he intended to raise, to which the sentencing minutes were pertinent, was petitioner's competence to stand trial (App. C., pp. A–4–8). In a supplemental affidavit, counsel stated that he was not aware of, and

did not find in his files, a copy either of the order of July 24, 1970, directing that the appeal be dismissed if the record was not filed by August 17, or the order of August 18 dismissing the appeal (Pet. App. C., pp. A–9–10). The motion to reinstate the appeal was denied by Judge Lumbard on October 1, 1970 (App. A., p. A–1). Petitioner seeks review of that order.

This appears to be a matter within the proper area of discretion of the court of appeals. Though the result may be harsh, it cannot be said that that court abused its discretion in declining to reinstate the appeal. The case apparently involved a series of unfortunate errors by petitioner's counsel, but the facts were developed before the chief judge of the court of appeals, and he did not consider it appropriate to condone petitioner's failure to meet the time standards which had been prescribed. Since petitioner had not complied with Rule 11(a) of the Rules of Appellate Procedure, under which the record was due on August 17, it was within the discretion of the court of appeals to conclude that the facts here did not justify entertaining this untimely appeal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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